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SUPREME COURT U.S.

No. 81 5872

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Buddy Earl Justus,

Petitioner,

-v-

Commonwealth of Virginia,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

Counsel for Petitioner:

Robert W. Spessard, Jr.
Spessard & Spessard
Main Street
P.O. Box 54
Floyd, Virginia 24091

H. Gregory Campbell, Jr.
Gilmer, Sadler, Ingram, Sutherland & Hutton
201 West Roanoke Street
P.O. Box 908
Blacksburg, Virginia 24060

Edward James Woodhouse, Jr.
Goldsmith, Anderson & Woodhouse
1067 Norwood Street
P.O. Box 892
Radford, Virginia 24141

QUESTIONS PRESENTED

1. Whether the presiding over Petitioner's objection, of the same trial judge at the Petitioner's second trial as sat at the Petitioner's first trial, violates the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Whether the denial of state-paid independent psychiatric services violated the Sixth Amendment, or the Due Process clause or Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States?

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Petitioner, Buddy Earl Justus, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 222 Va. ___ , 283 S.E.2d ____ (1981), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on October 16, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> " In all criminal prosections, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence;"

and the Fifth Amendment to the Constitution of the United States which provides in relevant part:

> "No person shall be deprived of life, liberty, or property without due process of law;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> " (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Petitioner, Buddy Earl Justus, was convicted and sentenced to death for the October 3, 1978 murder and rape of Ida Mae Moses. The death sentence was vacated in Justus v. Commonwealth, 220 Va. 971 (1980), because of error in the selection of the jury. A second trial was held, presided over by the same judge who presided over the first trial, and on November 6, 1980, Petitioner was again found guilty of capital murder and sentenced to death. The Supreme Court of Virginia upheld this conviction. Justus v. Commonwealth, 222 Va.___, 283 S.E.2d___(1981).

At his first and second trials, Petitioner requested state funds to employ independent psychiatrists to assist in his defense. Petitioner was examined by state psychiatrists at the regional state mental hospital, but was denied funds with which to employ independent psychiatric aid.

At his second trial, Petitioner moved Judge Devore to disqualify himself on the grounds that he had presided as trial judge in the first trial. Judge Devore remarked on the record that he "ought to grant" the motion, but then denied the same and presided over the second trial where Petitioner was sentenced to death.

ARGUMENT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PRESIDING, OVER PETITIONER'S OBJECTION, OF THE SAME TRIAL JUDGE AT THE PETITIONER'S SECOND TRIAL AS SAT AT THE PETITIONER'S FIRST TRIAL, VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

The Virginia Code provides that in capital cases, the Defendant is entitled to a bifurcated trial, with separate trials on the issues of guilt and penalty, and further provides by statute (Virginia Code Section 19.2-264.5) that the trial judge shall review the sentence of death to assure that it is "appropriate and just". By this statute, the trial court is given the power, indeed the duty, to set aside the sentence of death and impose a sentence of imprisonment for life whenever "good cause" is shown. This crucial check, built into the statutory scheme adopted by the Virginia legislature, is in addition to the automatic review by which the Supreme Court of Virginia takes yet another precautionary look at this most final of penalties. Petitioner urges that this statutorially imposed duty of review is unique in the history of criminal law. Further, the statute's purpose is to address the concerns for just and principled decisions with respect to the imposition of the penalty of death, previously expressed in this Court's numerous decisions, but most particularly in Furman v. Georgia, 408 U.S. 238 (1972).

The principal concern enunciated in this Court's opinion in the Furman decision was that the death penalty in the United States had been applied under state statutory schemes that provided for insufficient criteria for the juries hearing such cases, and thereby allowed the prejudicial imposition of the death penalty on a disproportionate number of defendants who were members of minorities, whether social or economic in nature. The particular evils confronted in Furman, and remedied thereby, are not directly in issue. The statutory scheme adopted by Virginia, and other states, the scheme whereby Petitioner was convicted and sentenced to death, all pass constitutional muster with respect to those requirements elaborated in Furman and its progeny. The Petitioner urges that the specific principles embraced in the Furman and other decisions require the imposition of a rule forbidding trial judges who have presided over capital trials from sitting as trial judges in the retrial of such cases, where the statutory scheme adopted by the state

requires that the trial judge exercise this extraordinary reviewing function, as is mandated by Virginia Code Section 19.2-264.5.

This Court should grant certiorari to Petitioner's claim because it presents a legal issue which is or will be present in numerous retrials of those persons convicted of the death penalty under statutory schemes such as Virginia's. The death penalty statutes of California and Virginia have schemes providing for the trial judge's extraordinary review of the appropriateness and justness of the imposition of the death penalty by the jury. Therefore, the decision to grant certiorari in this case will have an impact in informing numerous courts and counsel in both states, both for the prosecution and defense, of this Court's position on this crucial issue. As the length of time these statutes have been in effect increases, the percentage of retrials under them naturally increases, and the need for consideration of this issue shall likewise increase. It is in the interest of efficient administration of justice that this point be addressed at this time, and the posture of this individual case makes it suitable for judicial review.

As stated above, it has long been this Court's concern that the imposition of the death penalty be done under state statutes providing for principled decisions by those persons exercising the discretion to choose between life and death. This Court has recognized that the gravity of the choice between life and death requires an increased scrutiny of the extent to which that choice is principled. See Gardner v. Florida, 430 U.S. 349 (1977); Green v. Georgia, 442 U.S. 95 (1975).

Until now, attention has primarily been focused upon the extent to which state statutory schemes have provided for fair and principled decisions by juries. Petitioner's claim merely seeks the specific application of those same standards upon the means by which judges use their discretion to choose between life and death. The essence of Petitioner's claim is that where, as here, the state has chosen to provide for the mandatory review of a jury's sentence of death by the trial judge, and where, as here, that review takes the form of the exercise of the discretionary choice between life

imprisonment and death, that a criminal defendant subjected to that system has a constitutional right under the Fifth, Sixth, and Fourteenth Amendments to have that "review decision" made at his retrial by a judge who had no connection with his first trial.

In support of his contention, Petitioner submits that the decision that the trial judge makes under Virginia Code 19.2-264.5 is essentially a discretionary choice between life imprisonment and death based on the statutory criteria set forth therein. To a significant degree, this choice is indistinguishable from the choice made by the jurors themselves in their decision whether to impose life imprisonment or death. No one would question that a juror who served at Petitioner's first trial would be automatically excluded from serving on the jury at the second trial. Petitioner urges that a similar standard should be applied for trial court judges since their decision is substantially the same as that of jurors. The choice the trial judge is required to make under Virginia Code Section 19.2-264.5 is in fact even more discretionary in nature than the choice made by the jurors in reaching their verdict in the penalty phase. The jurors are instructed that they can impose the death penalty upon finding that (1) "the accused would commit criminal acts of violence that would constitute a continuing serious threat to society," or (2) "his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim." Virginia Code Section 19.2-264.4. The statute requiring review by the trial judge sets forth even fewer criteria for consideration. It requires solely that the judge authorize investigation of the defendant so that the judge will "be fully advised as to whether the sentence of death is appropriate and just," and further empowers the judge to set aside the death penalty "upon good cause shown." Virginia Code Section 19.2-264.5.

Since the judge's decision under Virginia Code Section 19.2-264.5 is more discretionary in nature than the jury's decision under Virginia Code Section 19.2-264.4, it seems anomalous that a juror that sat on Petitioner's first trial is automatically disqualified from sitting on his second, while

the judge who sat on the first trial is allowed to sit on the second trial. At least the same safeguards employed as to jurors should be employed as to judges when statutes authorizing the death penalty provide for this extraordinary review.

This Court's adoption of the rule urged by Petitioner would not create an administrative burden of any significance. In Petitioner's own case, two other trial judges of the Twenty-seventh Judicial Circuit, or two retired judges of the Circuit could have presided over Petitioner's second trial without any administrative inconvenience. And in any case, if the interests of justice require the use of a bifurcated trial in death penalty cases, the requirement of a second trial judge on retrial cannot be claimed to be truly burdensome.

Petitioner's claim need not rest on any allegation of conscious bias on the part of Judge Devore. However, the trial judge's candid remarks in denying Petitioner's motion for disqualification virtually admit a taint from the first trial that is the gist of Petitioner's complaint here.The Court said ".....and there was a motion for me to disqualify myself from hearing the Defendant's retrial, which I ought to grant, but I don't see how I can under the circumstances in that I am the judge, one of the judges of, in the twenty-seventh judicial circuit and I am sure that I can see that Mr. Justus receives a fair trial in Williamsburg, and I could seen that he had one up here if we were trying him up here. I will deny that one again." (Emphasis added.) (App. 283) Judge Devore's candid remarks demonstrate his recognition of the difficulty of presiding at the second trial, and in particular reviewing the sentence of the jury.

Together with this difficulty is the inevitable concern of the trial judge that the case is being retried, and that at least implicitly, the trial judge's performance in the first trial was in some manner deficient inasmuch as whatever appellate court reversed the original conviction did not agree with the trial judge in his assessment of the fairness of the original trial. This concern is most obviously presented in this case, where Judge Devore in his comments to the Petitioner at the conclusion of the retrial stated that

"I feel that you have had a fair and impartial trial. I feel like you had one in Montgomery County (original trial) and I feel like you have had one here."

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF STATE-PAID INDEPENDENT PSYCHIATRIC SERVICES VIOLATED THE SIXTH AMENDMENT OR THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

Although this Court has not as yet ruled on the question of an indigent defendant's constitutional right to state-paid expert assistance, several lower courts have concluded that indigent defendants are entitled to such services, both under the equal protection clause of the Fourteenth Amendment ((Williams v. Martin, 618 F.2d 1021, 1027 (4th Cir. 1980); Jacobs v. United States, 350 F.2d 571, 573 (4th Cir. 1965)), and in order to satisfy the Fourteenth Amendment's requirement of fundamental fairness and the Sixth Amendment's requirement of effective assistance of counsel (Williams v. Martin, supra, 618 F.2d at 1027; Bush v. McCollum, 231 F. Supp. 560, 565, (N.D. Tex. 1964), aff'd., 344 F.2d 672 (5th Cir. 1965); cf. Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975) (right to State-paid investigative services)). See also Gibson v. Jackson, 443 F. Supp. 239, 250 (M.D. Ga. 1977), vacated and remanded on other grounds, 578 F.2d 1045, 1054-55 (5th Cir.), cert. denied, 439 U.S. 1119 (1978) (constitutional right to access to the courts confers entitlement to State-paid expert services in state habeas corpus proceedings). These conclusions of the lower courts are consistent with this Court's declaration that "(t)here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," Griffin v. Illinois, 351 U.S. 12, 19 (1965), and this Court's conclusion that a criminal defendant's inability to marshal the information necessary to present his version of the facts smacks

of fundamental unfairness, see Argersinger v. Hamlin, 407 U.S. 25, 31-33 (1972); Gideon v. Wainwright, 372 U.S. 355 (1964). Cf. Little v. Streater, U.S. __, 49 U.S.L.W. 4581 (U.S., June 2, 1981).

In requesting an independent psychiatric examination, petitioner sought the type of "professional assistance that would have been available to a person who could afford his own defense." Williams v. Martin, supra, 618 F. 2d at 1027. A major goal of our entire system of justice has long been to see that all defendants, regardless of material wealth "stand on an equality before the bar of justice in every American Court." Chambers v. State of Florida, 309 U.S. 227, 241. Admittedly, the Petitioner in the case at bar was examined by officials at the state hospital and the defense was at liberty to question those officials and summons them to court. However, even though the Petitioner does not suggest that he be allowed to go "expert shopping" see e.g. Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969), if the psychiatric examination is to be worthwhile, the Petitioner must have some input into the selection process.

A court-ordered psychiatric examination by a State Hospital psychiatrist can hardly be deemed sufficient to satisfy the constitutional requirements governing this area of the law. As the lower courts have concluded, even an ostensibly neutral State psychiatrist conducting an apparently neutral examination may in fact be an adversarial proponent of the interests of the State. Jacobs v. United States, supra, 350 F.2d at 573; see Thornton v. Corcoran, 407 F.2d 695, 699 (D.C. Cir. 1969); cf. Bush v. McCollum, supra, 231 F. Supp. at 565 (implicitly ruling that the psychiatric examinations performed at the State Hospital could not suffice to satisfy the defendant's right to psychiatric assistance); see also Williams v. Martin, supra, 618 F.2d at 1026-27 (results of autopsy performed by state medical examiner who testified for the government was not sufficient to satisfy defendant's right to expert assistance). Commentators have similarly pointed out that clinical observations frequently reflect the professional orientation of the doctor as much as any objective factor, and that psychiatrists employed by the government are unavoidably influenced by that status. Diamond, "The

Psychiatrist As Advocate," 1 J. Psych. & Law 5, 13-17 (1973); Fitzgerald, Pezke & Goodwin, "Competency Evaluations in Connecticut," 29 Hosp. & Comm. Psych. 450, 452 (1978).

The need for independent psychiatric examination is particularly acute in capital cases, not only at the guilt phase but also at sentencing when, in Virginia, facts in mitigation which may be presented to the jury include:

(1) "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"

or

(2) "at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired." Code of Virginia, Section 19.2-264.4 (Cum. Supp. 1980).

Both of these factors necessitate the benefit of good psychiatric examination.

Accordingly, the Court should grant certiorari to determine whether the petitioner should have been permitted to procure the type of independent psychiatric examination that would have been available to an individual who could afford to pay for his own defense, and that was necessary to ensure fundamental fairness and effective assistance of counsel.

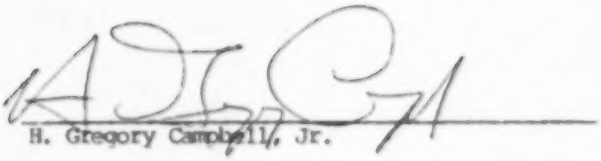
CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

BUDDY EARL JUSTUS

By Counsel



H. Gregory Campbell, Jr.

Counsel for Petitioner:

Robert W. Spessard, Jr.
Spessard & Spessard
Main Street
P.O. Box 54
Floyd, Virginia 24091

H. Gregory Campbell, Jr.
Gilmer, Sadler, Ingram, Sutherland & Hutton
201 West Roanoke Street
P.O. Box 908
Blacksburg, Virginia 24060

Edward James Woodhouse, Jr.
Goldsmith, Anderson & Woodhouse
1067 Norwood Street
P.O. Box 892
Radford, Virginia 24141

MAILING CERTIFICATE

I, H. Gregory Campbell, Jr., an applicant to become a member of the Bar of this Court, make oath that, on or before December 14, 1981, I caused this Petition for Writ of Certiorari, along with the accompanying Motion to Proceed In Forma Pauperis and supporting affidavit, to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused one copy of each of the above-mentioned documents to be sent to Robert H. Anderson, III, Deputy Attorney General for the Commonwealth of Virginia, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia, 23219, by depositing the documents in the United States Post Office or mailbox, with first class postage prepaid.

H. Gregory Campbell, Jr.

STATE OF VIRGINIA

AT LARGE, to wit:

Sworn, subscribed and acknowledged before me this 11th day of December, 1981, by H. Gregory Campbell, Jr.

NOTARY PUBLIC

My commission expires: January 24, 1985

APPENDIX "A"

PRESENT: All the Justices

BUDDY EARL JUSTUS

Record No. 810156

-v- Record No. 810156 OPINION BY JUSTICE W. CARRINGTON THOMPSON
October 16, 1981

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF JAMES CITY COUNTY
AND THE CITY OF WILLIAMSBURG
Kenneth I. Devore, Judge Designate

In a previous trial, Buddy Earl Justus was convicted of capital murder during the commission of, or subsequent to, rape, and sentenced to death. Code § 18.2-31(e). On appeal, we reversed the conviction and remanded the case for a new trial because of error in the selection of the jury. Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980). On remand, the court granted a change of venue and transferred the case from the Circuit Court of Montgomery County to the Circuit Court of James City County and the City of Williamsburg. A jury again found Justus guilty of capital murder and recommended the death sentence. After considering a presentence report compiled by a probation officer, and hearing testimony and argument, the court confirmed the jury's verdict and ordered that Justus be executed. Code § 17-110.1(A) requires that we review the death sentence, and we have consolidated this review with the appeal of his conviction, Code § 17-110.1(F), and given them priority on our docket as mandated by Code § 17-110.2.

On October 3, 1978, the husband of Ida Mae Moses found her nude, dead body lying on a bed in their home located in the Ironto section of Montgomery County. She had been shot in the head three times. He immediately summoned the rescue squad and the police. In their investigation the police retrieved various samples from the scene, including hair specimens from the victim, carpet fibers, fingerprints and clothing, and made several photographs of the victim. Missing from the residence were a bag of pennies and a .22 caliber "snub-nosed" revolver.

The forensic pathologist who conducted the autopsy testified that Mrs. Moses had been shot twice in the face and once in the back of the head and that any one of the gunshot wounds would have been fatal. A forensic analysis of swabs taken during the autopsy revealed the presence of seminal fluid in the vagina.

On October 10, 1978, a Montgomery County investigator apprehended Justus who, after being informed of his Miranda rights, confessed that he had burglarized the Moses home and murdered Mrs. Moses with a firearm, but specifically denied that he had raped her. The arresting officer took from Justus a .22 caliber "snub-nosed" revolver which was turned over to a firearms identification and ballistics expert for testing. Justus was charged with capital murder during the commission of, or subsequent to, the rape of Mrs. Moses.

At trial, Dale Dean Goins testified that, while he was hitchhiking in Georgia the day after Mrs. Moses' murder, Justus stopped and gave him a ride. Goins stated that on two occasions Justus admitted that he had raped and killed a woman in Virginia. According to Goins, Justus produced a bag of pennies he allegedly had taken from the woman.

Expert testimony regarding the ballistics tests of the gun seized from Justus indicated that test rounds fired from that weapon matched a slug removed from the victim. The expert witness opined that the slug removed from Mrs. Moses had been fired from the gun seized from Justus.

A forensic serologist testified that secretion tests, utilizing samples of hairs and swabs retrieved from the victim and saliva samples taken from Justus, indicated Justus "could not be excluded" as a source of the seminal fluid present in the decedent's vagina because his blood/fluid type was deemed "consistent"

I. Issues Previously Adjudicated.

Three assignments of error stemming from the retrial relate to issues resolved in the former appeal. We reaffirm our prior

holdings as follows: (1) The court properly refused a private psychiatric examination at the expense of the Commonwealth, 220 Va. at 978, 266 S.E.2d at 92. Martin v. Commonwealth, 221 Va. 436, 446, 271 S.E.2d 123, 129 (1980). (2) The court did not err in permitting the Commonwealth to prove that Mrs. Moses was pregnant at the time of her murder, 220 Va. at 979, 266 S.E.2d at 93. (3) Two color photographs of the victim were admissible at the sentencing stage of the trial, 220 Va. at 980, 266 S.E.2d at 93.

II. Recusal of Trial Judge.

In his first assignment of error, Justus argues that the trial judge improperly sat in the case on remand, claiming that because he had presided at the first trial, his impartiality and objectivity were impaired, and that he had failed to enforce the safeguards ensuring fair trials in capital murder cases. Justus supports his argument with the following remark made by the court before trial:

> And there was a motion for me to disqualify myself from hearing the defendant's retrial, which I ought to grant, but I don't see how I can under the circumstances . . . . I am sure that I can see that Mr. Justus receives a fair trial in Williamsburg . . . .

A trial judge must exercise reasonable discretion to determine whether he possesses such bias or prejudice as would deny the defendant a fair trial. Slayton v. Commonwealth, 185 Va. 371, 376, 38 S.E.2d 485, 488 (1946). In Slayton, we said:

> Frequently, in the disposition of cases, both civil and criminal, a judge is called upon to form and express an opinion upon a matter or issue which may come before him in a subsequent proceeding arising out of the same state of facts. The courts are practically unanimous in the view that neither the forming nor the expression of such a conclusion, under such circumstances, disqualifies a judge in the subsequent matter, particularly where the issue of fact in the latter proceeding is to be determined by a jury. [Citations omitted.]

Id.

We cannot say that the trial judge abused his discretion. Upon the original argument on the motion to disqualify, the trial judge stated:

> I think I can give him a fair and impartial trial based on the law and evidence and what comes before the Court, and that's what the state pays me for is to try these cases and I'll be just as fair as I can and I will deny your motion [to disqualify myself], gentlemen.

We do not feel that a per se rule requiring a judge to recuse himself on retrial of a capital murder case is necessary to assure a fair trial.

A comparable situation arose in Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979), when the defendant sought to disqualify the trial judge in the penalty phase of a capital murder conviction. The same judge had tried and convicted the defendant on 15 non-capital felony charges. Consistent with Slayton, we held that the judge had not erred in declining to recuse himself.

Other states follow the same rule. In Walker v. State, 241 Ark. 300, 309-10, 408 S.W.2d 905, 912 (1966), cert. denied, 386 U.S. 682 (1967), the Arkansas Supreme Court considered similar circumstances and stated:

> It is an established rule of law that while a trial judge may have an opinion as to the merits of the case on trial, this does not make him biased or prejudiced as to the conduct of the trial. When challenged for bias and prejudice, it is for the trial court to search his conscience and decide whether to recuse himself from the case. We find ... the trial court conducted the trial in an exemplary manner and without any bias or prejudice toward the accused.

See also Annot. 60 A.L.R.3d 176 (1974).

The record fails to reveal any evidence of judicial prejudice, and we find no merit in this assignment of error.

III. Challenge to Witherspoon.

In Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), the United States Supreme Court held that "jurors may not constitutionally be excluded for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." We have construed this language "to require, as a prerequisite to exclusion of a juror, an irrevocable commitment to vote against the death penalty,

rather than a general objection." Coppola v. Commonwealth, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), cert. denied, 444 U.S. 1103 (1980). See Adams v. Texas, 448 U.S. 38 (1980), and Lockett v. Ohio, 438 U.S. 586 (1978). But Justus contends that a jury seated after a Witherspoon voir dire is conviction-prone and, hence, not constitutionally impartial.[1]

Before retrial, Justus filed a written motion to prohibit voir dire questioning on jurors' attitudes toward the death penalty. He also filed a second motion asking the trial court to take judicial notice of evidence stipulated in Hovey v. Superior Court of Alameda Cty., 168 Cal. Rptr. 128, 616 P.2d 1301 (1980). This stipulated evidence came from expert testimony and exhibits used in People v. David Lee Moore and Kenneth Lynne Moore, No. 67113 (Alameda Cty. (Cal.) Super. Ct. 1979) to show a correlation between conviction rates and attitudes toward the death penalty. Justus also offered the following documents filed in Hovey: (1) Petition for Writ of Mandate and/or Prohibition and Request for Stay filed in Supreme Court of California November 27, 1979; (2) Petitioner's Opening Brief; and (3) Petitioner's Reply Brief and Answer to Brief of Amicus Curiae.

The evidence proffered is inadmissible because it violates the hearsay rule. But even if Justus had met his evidentiary requirements, we would still reject his argument. All the studies were compiled on statistics from other states. They do not show a correlation between conviction-proneness and attitudes toward the death penalty among Virginia jurors. In Turner v. Commonwealth, 221 Va. 513, 523, n. 9, 273 S.E.2d 36, 42, n. 9 (1980), we stated that a study "based upon statistics compiled in other states ...

[1] "Underlying the guilt-bias argument is the premise that jurors who have no scruples against capital punishment will necessarily be more prone to convict than jurors who express some reservations regarding the death sentence. Support for this premise is drawn from psychological studies documenting the thesis that a given individual will tend to run a coherent, discernible pattern with respect to attitudes and values. A juror unopposed to capital punishment, according to the thesis, fits into the mold of the so-called 'authoritarian personality' who tends to be more condemning, suspicious, and non-love-seeking than one who has some reservations about the death penalty." Spinkellink v. Wainwright, 578 F.2d 582, 593, n. 15 (5th Cir. 1978), cert. denied, 440 U.S. 976, rehearing denied, 441 U.S. 937 (1979), quoting Comment, 1969 Utah L. Rev., 154, 162.

was of little utility in establishing the potential of prejudice in Virginia."

Even assuming the studies showed a valid correlation between Virginia juror attitudes and conviction-proneness, we must reject the studies for another reason. The type of jury studied differs from the particular jury chosen to try Justus' case. In Hovey, the Supreme Court of California made a detailed analysis of the social science studies presented in the trial court and concluded that the studies could not reflect the California death-qualifying jury because the jury pool studied did not exclude those potential jurors who would automatically vote for the death penalty. Under the California statute, such jurors were subject to challenge for cause. 168 Cal. Rptr. at 170, 616 P.2d at 1343. In our situation, the same was true of the jury pool, not as a matter of statute but as a matter of fact. The court excused prospective juror Fosdick because he opposed the death penalty and prospective juror Small because he preferred the death penalty. Thus, the Virginia practice in this case corresponded with the California statute, and the experiments performed did not conform to the Virginia practice.

We hold, therefore, that the proof proffered was inadmissible.

IV. Voir Dire Examination About Religious Matters.

During the voir dire examination, Justus' counsel sought to propound the following questions: (1) "What is your religious preference?" (2) "Do you attend a local church?" (3) "Would you classify yourself as a regular or occasional attender?" The trial court refused these questions because they would invade a potential juror's privacy. We agree with the trial court.

In United States v. Barnes, 604 F.2d 121, 137, 141 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), the court said:

> What is required of a trial judge in his conduct of the voir dire . . . is that he permit at least some questioning with respect to any material issue that may arise, actually or potentially, in the trial.
>
> . . . .
>
> As to religion, our jury selections system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant, or Mohammedan, or to force them to publicly declare themselves to be atheists. Indeed, many a juror might have a real doubt as to the particular religious category into which they could properly place themselves. The same can be said of ethnic background.

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The defense counsel had the duty to identify a question's relevance to an actual or potential issue in the case. The trial court asked whether jurors held religious scruples about the death penalty. We hold that this is the proper extent of inquiry.

V. Requiring Counsel to Remain Seated During Voir Dire Examination.

On appeal, Justus objects to the trial court's requirement that defense counsel remain seated while examining potential jurors on voir dire. The record reflects no objection to this ruling. Under our Rule 5:21 regarding timely objection, "[e]rror will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling . . . . "

Furthermore, the conduct of a trial is committed to the trial judge's discretion, and absent evidence of an abuse of this discretion, we will not disturb his rulings on that subject. In this record, we find no evidence of an abuse of discretion or prejudice to Justus resulting from the ruling requiring counsel to remain seated.

VI. Refusal to Declare a Recess.

Justus contends the trial court erred when it refused his request to declare a luncheon recess to provide defense counsel more time to confer about peremptory strikes. Justus argues that the 15 minutes allowed for counsel to confer was insufficient. As we have just said, the trial court has broad discretion in conducting a trial, and we will not disturb its rulings on that subject absent an abuse of discretion.

In this case, the court pointed out that it had permitted defense counsel to investigate the jury panel before trial and to conduct voir dire separately. The court offered counsel time in addition to the 15 minutes allowed, but counsel refused the offer. We find no abuse of discretion in this matter.

VII. Refusal to Sequester the Jury.

Justus argues that the trial court should have sequestered the jury during his retrial to prevent prejudicial publicity reaching the jurors. We encountered the identical argument in Turner v. Commonwealth, supra, a capital murder prosecution in which the venue was changed from Southampton to Northampton County. We said:

> [A] judge has discretion in determining whether to sequester a jury. The mere fact of media coverage does not require a judge to sequester a jury. Thompson v. Commonwealth, 219 Va. 498, 247 S.E.2d 707 (1978). A trial judge's discretion regarding sequestration extends to cases involving capital punishment.

221 Va. at 525, 273 S.E.2d at 43.

The trial judge cautioned the jurors not to discuss the case or expose themselves to extra-judicial influence. Nothing in the record suggests that the jury ignored this admonition, and we uphold the ruling.

VIII. Failure to Strike the Evidence.

Justus contends that the capital aspect of the evidence should have been struck either at the conclusion of the Commonwealth's case or at the conclusion of all the evidence. Justus argues that the evidence fails to show he raped the victim, the evidence shows no more than recent sexual intercourse on the victim's part and an opportunity on the defendant's part to commit the offense. Justus argues further that the admissions he allegedly made to the hitchhiker, Goins, concerning rape are unworthy of belief because Goins was a convicted felon and an admitted user of alcohol and drugs.

We believe, however, that the trial court properly left to

the jury the questions of Goins' credibility and the weight to be given his testimony. If the jury believed Goins and considered his testimony entitled to weight, it would have been justified in returning a capital verdict. Hence, the trial court did not err in refusing to strike the evidence.

IX. Propriety of Second-Degree-Murder Instruction.

Justus now contends the jury should have been instructed that it could return a verdict of murder in the second degree. Although he did not proffer a second-degree-murder instruction, citing Ball v. Commonwealth, 221 Va. 754, 273 S.E.2d 790 (1981), he urges this court to consider the issue to "attain the ends of justice." Rule 5:21.

Ball, however, affords Justus no support. We employed the saving clause of Rule 5:21 there in order to consider an instruction granted without objection. But that instruction permitted a capital verdict when the evidence failed to show the commission of a capital offense. Here, as indicated in Part VIII, supra, the evidence was sufficient to support a capital verdict.

Furthermore, in Ball, the accused proffered and was refused an instruction on second-degree murder. We held the refusal was not error because there was no evidence to support a finding of second-degree murder. The rule followed in Ball is that a second-degree-murder instruction is appropriate only where there is evidence to support it, Painter v. Commonwealth, 210 Va. 360, 367, 171 S.E.2d 166, 171 (1969), Wooden v. Commonwealth, 208 Va. 629, 634, 159 S.E.2d 623, 627 (1968), and the evidence must amount to more than a scintilla, Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978). These principles apply in both capital and non-capital cases.[2] Linwood Earl Briley v. Commonwealth, 221 Va. 532, 541, 273 S.E.2d 48, 54 (1980).

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[2]Code § 19.2-264.3. Procedure for trial by jury.--A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor. [Emphasis added.]

Here, the only real issue before the jury was whether Justus was guilty of capital murder or first-degree murder. The evidence did not support a second-degree-murder instruction. Hence, even if the point had been preserved for appeal, the result would have been adverse to Justus.

X. Argument of Commonwealth's Attorney.

A. Statement about Murder Inference.

The defendant contends that the prosecuting attorney misspoke the law in his closing argument because he did not state the Virginia rule that all murder is inferentially of the second degree. As we have said heretofore, the only issue before the jury was whether the defendant was guilty of capital murder or first-degree murder. We conclude that the prosecutor's argument was proper and within the framework of issues before the jury.

B. Reference to Husband.

Justus argues that the trial court improperly refused his motion to grant a mistrial, made on the ground the Commonwealth's Attorney's rebuttal argument was prejudicial.

During cross-examination of the forensic serologist, the defense counsel asked whether she had tested Mr. Moses and could include or exclude him as a possible source of the seminal fluid found in Mrs. Moses. The witness stated Mr. Moses had not been tested. During closing argument, the defense repeated that Mr. Moses had not been tested. In rebuttal, the Commonwealth's Attorney asked the jury to "[t]hink ... for a moment" about the defense's suggestion that Mr. Moses had sexual intercourse with his wife after she had been murdered by Justus.

The record indicates that counsel objected to the argument only after the jury retired, seeking a mistrial because an admonition to the jury could not correct the alleged error. The trial court refused the motion for mistrial, ruling the argument was proper under the circumstances. We agree with the trial court.

XI. Refusal to Permit Justus to Make Opening Statement to the Jury in Penalty Phase.

On July 29, 1980, Justus filed a written motion asking leave to participate in his trial as co-counsel. The court granted the motion although in the earlier trial Justus had not requested self-representation and he had failed to articulate an adequate reason for the motion in the second trial.

In the second trial, Justus did not participate in the guilt phase, but at the outset of the penalty phase, he gave the opening statement. The Commonwealth objected because the nature of Justus' statements was testimonial.[3] The court upheld the Commonwealth's objection. The trial judge observed that Justus' motion for self-representation was a ploy for the defendant to testify without the safeguard of an oath or the risk of cross-examination or impeachment.

The United States Supreme Court recently stated in Faretta v. California, 422 U.S. 806, 834, n. 46 (1975), that the "right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with the relevant rules of procedural and substantive law." In Williams v. State, 549 S.W.2d 183, 187 (Texas Ct. of Crim. App. 1977), the court said "[t]he rules of evidence, procedure, and substantive law will be applied the same to all parties in a criminal trial whether that party is represented by counsel or acting pro se." See Annot. 77 A.L.R.2d 1233 (1961).

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[3] Justus made the following opening statement as counsel:

> Mr. Campbell: Mr. Justus, himself, will make the opening statement, your Honor.
>
> . . . .
>
> Mr. B. E. Justus: Ladies and gentlemen, I'm Buddy Justus, and I'd like to tell you a little bit about myself, and give you a little background of my life. And I don't know where to start off at.
>
> I come from a very large family, and my mom and my dad both were alcoholics, and I was beat when I was little, when they would get drunk. And I never had proper education; feel like life as a decent citizen should be. I was more or less on my own from the time I was ten years old, up to now.
>
> I joined the Marine Corps, and I didn't like it, so I got a general discharge under honorable conditions, after I was old enough to join. I was in the Marine Corps. for a very short time; and I came to Roanoke, Virginia.
>
> Mr. Graybeal: Excuse me, your Honor, this is new to me .... This portion of the trial will be to acquaint

The trial court, in its discretion, could permit Justus to act as co-counsel, but this status conferred no privilege upon him to ignore settled rules of evidence and procedure. We hold that the trial court did not err in sustaining the Commonwealth's objection to Justus' opening statement.

XII. Statutory Review of Death Sentence.[4]

A. Was the Sentence a Product of Arbitrary Factors?

We have carefully reviewed the voluminous record in this case and did not find, nor has Justus pointed out, evidence of any passion, prejudice or other arbitrary factors exerting an influence upon the jury. We therefore hold that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

B. Excessiveness or Disproportionality.

In Stamper v. Commonwealth, 220 Va. 260, 283-84, 257 S.E.2d 808, 824 (1979), cert. denied, 445 U.S. 972 (1980), we said that "the test is whether penalty juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant" and at the same time, in Coppola v. Commonwealth, 220 Va. at 256, 257 S.E.2d at 806, we said "our consideration of similar cases should be limited generally to cases arising in Virginia under our revised death penalty statutes."

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the jury what we're doing. This is testimony and evidence in the trial, and is not an opening statement in the sentencing phase.

[4] Code § 17-110.1. Review of death sentence.--A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

. . . .

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have reviewed five previous death penalties imposed for murder during the commission of, or subsequent to, rape.[5] Considering the ghastly conduct of Justus, the condition of the victim at the time, and the vicious nature of the crime, we conclude that the sentence was neither excessive nor disproportionate.

XIII. Cruel and Unusual Punishment.

Finally, Justus argues that the death penalty is cruel and unusual punishment in violation of the 8th and 14th Amendments of the federal Constitution, citing District Attorney for Suffolk District v. Watson, ___ Mass. ___, 411 N.E.2d 1274 (1980).

We expressly rejected this argument in Stamper v. Commonwealth, supra, Waye v. Commonwealth, supra, and Smith v. Commonwealth, supra, and we reaffirm our prior holdings.

For these reasons, the judgment of the lower court will be

Affirmed.

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[5] Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979), defendant raped victim at knifepoint, choked, drowned, then stabbed her several times in the back.

Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, cert. denied, 442 U.S. 924 (1979), defendant raped a 61-year old woman, biting her breasts and buttocks, battered her face beyond recognition, stabbed her 42 times and poured Clorox over her.

Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979), defendant raped a 71-year old woman, hit her, beat her with an ax, drove a nail through her wrist, then burned her alive.

Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980), defendant raped and strangled a 15-year old girl.

James Dyral Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980), defendant and two others raped the victim, then shot her four times.